LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 648

ELIZABETH C. BARNES,

Petitioner,

v.

THE A. S. ABELL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

FRANCIS D. MURNAGHAN, JR.
GEORGE COCHRAN DOUB, JR.
1400 Mercantile Trust Building
Baltimore, Maryland 21202
Attorneys for Respondent.

The Daily Record Co., Baltimore, Md. 21201

Table of Contents

	PAGE
Question Presented	1
Statement of the Case	1
Reasons for Denying the Writ	8
The Court of Appeals of Maryland Correctly Held That a Newspaper Article Erroneously Listing Mrs. Barnes Among Eighty-Six Candidates Who Failed to File Financial Reports Was Protected Under the Constitutional Guarantees of Free Speech and Free Press, and, Therefore, Was Not Actionable in the Absence of Proof of Actual Malice	8
Conclusion	15

Table of Citations

Cases

Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc., 286 F. Supp. 899 (W.D. Pa. 1986)	11
Arizona Bio-Chemical Co. v. Hearst Corp., 302 F. Supp. 412 (S.D.N.Y., 1969)	11
Beckley Newspaper Corp. v. Hanks, 389 U.S. 81 (1967)	8
Bon Air Hotel, Inc. v. Time, Inc., 426 F. 2d 858 (C.A. 5, 1970)	11
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	8, 12
Dyer v. Davis, 189 So. 2d 678, 685 (La., 1966) *writ refused* 250 La. 534, 197 So. 2d 79 (1967)	10
Garrison v. Louisiana, 379 U.S. 64 (1964)	8, 10
Greenbelt Cooperative Publishing Assoc. v. Bresler, 398 U.S. 6 (1970)	8
Hackworth v. Larson, 165 N.W. 2d 705 (S.D., 1969)	15
Henry v. Collins, 380 U.S. 356 (1965)	8
Holmes v. Curtis Publishing Co., 303 F. Supp. 522 (D.S.C., 1969)	11

PAGE

Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) 8

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 8, 9, 10, 11, 14

Noonan v. Rousselot, 239 Cal. App. 2d 447, 48 Cal. Rptr. 817 (1966) 10

Phifer v. Foe, 433 P. 2d 870 (Wy., 1968) 10

Pickering v. Board of Education, 391 U.S. 563 (1968) 8

Rosenblatt v. Baer, 383 U.S. 75 (1966) 8, 9, 15

Rosenbloom v. Metromedia, Inc., 415 F. 2d 892 (C.A. 3, 1969) *cert. granted* 397 U.S. 904 (1970) 11

St. Amant v. Thompson, 390 U.S. 727 (1968) 8

Thompson v. Evening Star Newspaper Co., 394 F. 2d 774 (C.A.D.C., 1968) *cert. den.* 393 U.S. 884 (1968) 10, 15

Time, Inc. v. Hill, 385 U.S. 374 (1967) 8, 11

Time, Inc. v. McLaney, 406 F. 2d 565 (C.A. 5, 1969), cert. den. 395 U.S. 922 (1969) 15

Time, Inc. v. Ragano, 427 F. 2d 219 (C.A. 5, 1970) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 648

ELIZABETH C. BARNES,

Petitioner,

v.

THE A. S. ABELL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Did the Court of Appeals of Maryland correctly hold that a newspaper article which, though inadvertently, erroneously listed Mrs. Barnes among eighty-six candidates who failed to file financial reports required by Maryland's election laws, was protected under the constitutional guarantees of free speech and free press, and, therefore, was not actionable in the absence of proof of actual malice?

STATEMENT OF THE CASE

The election of delegates to the Maryland Constitutional Convention was held on June 13, 1967 (E. 13). On June 16.

1967, The A. S. Abell Company published in the Evening Sun an article (E. 145) listing eighty-six candidates to the Constitutional Convention who, the article asserted, had failed to file preliminary expense reports required under the Maryland Corrupt Practices Act. Included in the list of names was that of Mrs. Barnes. In addition to the list of names, the article made a further specific reference to Mrs. Barnes:

> "Two of the losing candidates who did not file reports were Thomas N. Biddison, Jr. and Robert A. Sapero, both assistant prosecutors in the Moylan office. A third was Mrs. Elizabeth C. Barnes, wife of Judge Wilson K. Barnes, of the Maryland Court of Appeals."

The article asserted that candidates who did not file reports were subject to $1,000 fines and/or one year jail sentences, and under the subtitle "Regarded as Criminal" stated that "because of the loosely defined State code, any violation that results in a fine or sentence is regarded as a criminal act." State's Attorney Charles E. Moylan was quoted as saying that he did not consider the act to be fair in that regard, and that, since he considered the filing requirement to constitute an administrative regulation and a "technicality," his office would not bring criminal charges for non-wilful violation of the filing requirements.

The Evening Sun article was in error. Mrs. Barnes had filed her preliminary expense report in full compliance with the Corrupt Practices Act, and the inclusion of her name among those of the delinquent candidates was the result of a mistake on the part of Jerome Kelly, the newspaper reporter who conducted the investigation.

Jerome Kelly had been the political reporter for the Evening Sun since June of 1965 (E. 75). Between that date and June 15, 1967, the date on which he reviewed the

financial statements filed in the office of the Clerk of the Circuit Court of Baltimore City, he had been assigned to cover the political and governmental activities of the City of Baltimore and the State of Maryland (E. 82), and had covered the campaigns of candidates for various political offices including campaigns of many candidates for the office of delegate to the Constitutional Convention (E. 82-83). The position of political reporter was one of the most important staff assignments on the Evening Sun (E. 109). Philip S. Heisler, the managing editor of the Evening Sun, testified that he considered Kelly to be an extremely able, careful, accurate reporter whose promotion to political reporter was attributable to the fact that he was very capable and highly responsible (E. 109).

On the morning of June 15, 1967, Kelly met at a local restaurant Frank DeFilippo who, at the date of trial, was Governor Mandel's Press Secretary and who, on June 15, 1967, was and had been the political reporter for the Baltimore News American for six years (E. 114). Discovering that they both planned to investigate the filing of expense reports by Baltimore candidates in the June 13, 1967 Constitutional Convention election, they went together to the office of the Clerk of the Circuit Court of Baltimore City where the reports were filed (E. 75). They first asked Louis Cohen, Chief Deputy Clerk of the Circuit Court, to let them see the list of delinquent candidates prepared by the Clerk to be sent to the State's Attorney's office; however, Cohen was unwilling to do so (E. 76). Cohen then showed them the manner in which all reports required of candidates were filed (E. 76). Cohen explained that each designation of a treasurer, the initial document required by law to be filed, was placed in one of the file boxes (E. 135)[1]

[1] On June 15, 1967, the reports were apparently contained in two, rather than four, file boxes (E. 91).

when received. Thereafter, when a financial report came into the clerk's office, it was combined with the treasurer's designation, the designation being folded around the financial report (E. 15-16, 76).

Kelly and DeFilippo reviewed the file boxes, which contained the papers filed by the three hundred and forty-four candidates and committees, (see Plaintiff's Ex. 10), in search of delinquent candidates. Kelly leafed through the reports and called off the names of each delinquent candidate (E. 76-78, 95-96). DeFilippo then circled that candidate's name on a list of candidates which he had brought with him (E. 77). Because of the Clerk's practice of bundling the treasurer's designation and the financial report together, Kelly first looked at each separate bundle of papers without removing it from the file box, and only where a treasurer's designation contained no report inside, did he take the paper out and call off the name of the candidate who had filed that treasurer's designation (E. 93, 96). One such designation, bearing the clerk's index number "300", which had no financial report attached (E. 138, Plaintiff's Ex. 6) stated on the outside the following:

> "300
> Phyllis M. Chait
> Treasurer for Citizens
> Committee for Election of
> Elizabeth C. Barnes"

Kelly erroneously construed this as the designation of the treasurer for Elizabeth C. Barnes and, since it contained no report of receipts and disbursements, called off Mrs. Barnes' name (E. 77, 94, 96-97, 100). In fact, the boxes of reports also contained as item No. 26 an additional treasurer's designation for Elizabeth C. Barnes, individually, with her financial report inside (E. 137, Plaintiff's Ex. 5).

Kelly, however, under the procedure he had adopted, paid no attention to those documents since he pulled out for examination only treasurer's designations which did not contain financial reports folded within them. Consequently he had passed over Mrs. Barnes' individual treasurer's designation and report without noticing them or their contents (E. 77, 92-93, 96-97). The Citizens Committee for the Election of Elizabeth C. Barnes was the only committee named to achieve election of a specific candidate (see Plaintiff's Ex. 10), the other committees all bearing such titles as "Fourth District Citizens Constitutional Convention Committee".

After completing the review of the file boxes, Kelly again requested that Cohen show him the list of delinquent candidates which Cohen had prepared to send to the State's Attorneys' Office. Cohen again declined to do so. Thereafter Kelly obtained a full list of the constitutional convention candidates for districts in Baltimore City, and telephoned DeFilippo from whom he obtained the names of the delinquent candidates as determined by them when in the Clerk's office (E. 77-78, 98).

After a telephone discussion with Charles E. Moylan, the State's Attorney, regarding the Corrupt Practices Act, Kelly wrote the article of June 16, 1967 (E. 79, 99). The subtitles were written by a copy reader who, as was the customary practice, inserted the subtitles every several inches for the purpose of breaking up the long columns of print (E. 105, 109-110). When Kelly wrote the article, he believed it was accurate and that it had been checked as far as it could (E. 80).

On June 16, 1967, the News American published an article (E. 155, Defendant's Ex. 5) under DeFilippo's byline which was in substance virtually identical with that of the Evening Sun article.

By letter dated June 19, 1967 (E. 149, Plaintiff's Ex. 15), Mrs. Barnes brought the error to the attention of William F. Schmick, Jr., president of The A. S. Abell Company and by letter of June 21, 1967 (E. 151, Plaintiff's Ex. 16) Philip S. Heisler, managing editor of the *Evening Sun*, responded, explaining the basis of the error and offering to print a correction. Mrs. Barnes referred Heisler to her attorney (E. 153, Defendant's Ex. 2), who, in response to further inquiry regarding a correction (E. 154, Defendant's Ex. 3), indicated that Mrs. Barnes did not request a correction and that in his opinion a correction would not be helpful to Mrs. Barnes (E. 155, Defendant's Ex. 4).

At the trial Mrs. Barnes proved the publication of the article and that the publication was in error as to her. In addition she testified, on the issue of general damages, as to her dismayed reaction to the article (E. 38-39). No evidence was offered of actual malice on the defendant's part. The trial court observed that there was no such evidence and that the case was being submitted to the jury under instructions permitting an award of punitive damages solely because the article was libelous *per se* (E. 119).

Although the plaintiff had offered into evidence Mrs. Barnes' letter of June 19, 1967, and Heisler's letter of June 21, 1967, offering to print a correction, the court sustained the plaintiff's objections to a letter (E. 154, Defendant's Ex. 3) from J. Crossan Cooper, counsel for the defendant, to plaintiff's counsel, Alan H. Murrell and Mr. Murrell's reply of July 6, 1967 (E. 155, Defendant's Ex. 4) which would have established that the plaintiff was responsible for the fact that no correction was printed. The court further sustained the objection of Plaintiff's counsel to introduction of, or any evidence pertaining to, the News American article of June 16, 1967 (E. 117-118).

In addition to being a candidate for the office of delegate to the Constitutional Convention in the election of June 13, 1967 (E. 25), Mrs. Barnes was, at the date of the publication, a citizen of very substantial prominence. She was the wife of a member of the Court of Appeals, the highest court of the State of Maryland, a member of the Maryland Bar (E. 24) and a member of the American Bar Association (E. 24). She had written articles regarding constitutional law (E. 25), was a member and state president of the Daughters of the American Revolution (E. 40), a member and parliamentarian of the Daughters of 1812 (E. 40-41), a member of the Daughters of Colonial Wars (E. 41), and local chairman of the Minute Women (E. 41).

Mrs. Barnes testified that she considered the constitutional convention and revision of the state constitution to be matters of great public concern (E. 41), and it was for this reason that she decided to run for the office of delegate (E. 41-42). In advance of the election, Mrs. Barnes had issued a press release to the Sunpapers (at the Sunpaper's request) setting forth her qualifications for the office and her reasons for seeking election (E. 150; T. 105, 279-280).

At the close of the evidence the court denied defendant's renewed motion for a directed verdict, and granted the plaintiff's motion for a directed verdict (E. 8). The case, therefore, went to the jury solely on the issue of damages. The jury was instructed that the article declared on was libelous *per se*, and, therefore, persumed to have been published with malice (E. 125); that the plaintiff could recover general damages without further proof of pecuniary damages (E. 129-130); and that the plaintiff could recover punitive damages without proof of malice (E. 131). Moreover, the jury was instructed that, in assessing damages, it could consider the defendant's net worth, as dis-

closed by its financial statement (E. 127-128). The defendant excepted to those portions of the charge, and to the refusal to instruct that, if Mrs. Barnes was a public official or public figure, or if the article declared on otherwise concerned a matter of public interest, the plaintiff could not recover in the absence of proof that the publication was with awareness of falsity or in reckless disregard of whether it was true or false (E. 122).

The Maryland Court of Appeals concluded that Mrs. Barnes was a public figure and that there was no sufficient evidence that the publication declared on was made with actual malice in the sense that representatives of The A. S. Abell Company knew that the article was false or entertained serious doubts as to the truth of the article. The decision of the trial court denying the Defendant's motion for directed verdict at the close of the evidence was therefore reversed.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS OF MARYLAND CORRECTLY HELD THAT A NEWSPAPER ARTICLE ERRONEOUSLY LISTING MRS. BARNES AMONG EIGHTY-SIX CANDIDATES WHO FAILED TO FILE FINANCIAL REPORTS WAS PROTECTED UNDER THE CONSTITUTIONAL GUARANTEES OF FREE SPEECH AND FREE PRESS, AND, THEREFORE, WAS NOT ACTIONABLE IN THE ABSENCE OF PROOF OF ACTUAL MALICE.

The scope of the constitutional protection for free speech and free press which has evolved in the *New York Times Co. v. Sullivan*[2] line of decisions of this Honorable Court

---

[2] 376 U.S. 254 (1964); *Beckley Newspaper Corp. v. Hanks*, 389 U.S. 81 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Greenbelt Cooperative Publishing Assoc. v. Bresler*, 398 U.S. 6 (1970); *Henry v. Collins*, 380 U.S. 356 (1965); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

clearly extends to and beyond the facts of this case. As a candidate for public office, Mrs. Barnes had voluntarily made herself a figure of pressing public interest and concern. Since the publication declared on concerned the failure of a large number of candidates for public office in Baltimore City to comply with the financial disclosure requirements of the Corrupt Practices Act, the subject matter was of legitimate public concern. The error which caused The A. S. Abell Company to include Mrs. Barnes' name among those of candidates who had failed to comply with the Act was the product of inadvertent confusion of two pamphlets filed among a mass of 344 such pamphlets; moreover, the error was made jointly by an experienced reporter of The A. S. Abell Company and by a distinguished reporter for the only other daily newspaper of general circulation in the Baltimore area. The evidence, therefore, clearly demonstrates that the publication occurred without malice. Such was the conclusion of the trial judge (E. 119), and the jury which refused to award punitive damages.

Although there are various subjects of legitimate public interest with respect to which speech is constitutionally protected under the *New York Times* line of decisions, the single most important such subject in a democratic society (and indeed in all societies) is government.

> "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer,* 383 U.S. *supra,* at 85.

For this reason candidates for public office are unmistakably to be included among those citizens whose charac-

ter and reputation must be exposed to public scrutiny and discussion.

> " 'It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counter-balance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged.' " *New York Times Co. v. Sullivan, supra,* 376 U.S. at 281, and see *Garrison v. Louisiana, supra,* 379 U.S. at 77.[3]

The publication declared on in this case was constitutionally protected not only because Mr. Barnes was a public figure, but also because the subject matter of the publication constituted a matter of pressing public interest. The article concerned the extent of compliance by candidates in Baltimore City with the financial disclosure provisions of the Maryland Corrupt Practices Act, an obligation of the utmost public concern since the information disclosed by candidates in their financial reports enlightens the citizenry on the important public issues of what financial resources have been placed at a candidate's disposal, and

---

[3] The argument that candidates are not public officials was rejected by the Court in *Dyer v. Davis,* 189 So. 2d 678, 685 (La., 1966), *writ refused,* 250 La. 534, 197 So. 2d 79 (1967):

> "To hold that the rule applies to the office holder nd not to a candidate who may oppose him for the same public office would, in our judgment, constitute a manifest anomaly resulting in a gross inequity. Such a ruling would afford a candidate seeking election a tremendous advantage over his incumbent opponent."

See also *Noonan v. Rousselot,* 239 Cal. App. 2d 447, 48 Cal. Rptr. 817 (1966); *Phifer v. Foe,* 433 P. 2d 870 (Wy., 1968); *Thompson v. Evening Star Newspaper Co.,* 394 F. 2d 774 (C.A.D.C., 1968) *cert. den.* 393 U.S. 884 (1968).

what use the candidate has made of such resources. Therefore, if Kelly had erroneously included in his list of candidates an individual who had not been a candidate at all and who was not a public figure in any sense, nevertheless the *New York Times* reasoning would be applicable to bar a recovery in the absence of proof of malice. *Time, Inc. v. Hill, supra,* involved an action for invasion of privacy based upon a Life Magazine article which described a recently opened play as an adaptation of a widely publicized occasion on which the plaintiff and his family were hostages of several escaped convicts. The description was inaccurate since the play only remotely related to the incident involving the plaintiff and his family. However, this Honorable Court concluded that the *New York Times* principle was applicable based upon the public interest involved:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. . . . We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. 'The line between the informing and the entertaining to too elusive for the protection of . . . [freedom of the press].'" *Time, Inc. v. Hill, supra,* 385 U.S. at 388.[4]

---

[4] For additional cases involving the application of the *New York Times* rule with respect to matters of public interest where no public figure was involved, see *Altoona Clay Products, Inc. v. Dunn & Bradstreet, Inc.,* 286 F. Supp. 899 (W.D. Pa., 1968); *Arizona Bio-Chemical Co. v. Hearst Corp.,* 302 F. Supp. 412 (S.D.N.Y., 1969); *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F. 2d 858 (C.A. 5, 1970); *Holmes v. Curtis Publishing Co.,* 303 F. Supp. 522 (D.S.C., 1969); *Rosenbloom v. Metromedia, Inc.,* 415 F. 2d 892 (C.A. 3, 1969) *cert. granted,* 397 U.S. 904 (1970); *Time, Inc v. Ragano,* 427 F. 2d 219 (C.A. 5, 1970).

The essence of Mrs. Barnes' argument is that the Maryland Court of Appeals based its decision reversing the jury verdict upon the conclusion that Mrs. Barnes was a public figure, without proceeding to the second "dimension" — i.e. to a determination of whether under the particular facts, society's interest in discussion of Mrs. Barnes was outweighed by society's interest in protecting the reputation of individuals against false and defamatory statements. This second dimension in the judicial decision-making process finds no precedent in the decisions of this Honorable Court, but as expounded by the Petitioner evidently entails a judicial determination in actions for libel of whether the plaintiff's access to means of counter-argument is so inadequate that curtailment of free discussion is justified in spite of the existence of legitimate public interest in the plaintiff (Petition for Writ of Certiorari, pp. 14-15, 17).

The existence *vel non* of access to means of counter-argument, however, is not a threshold question of fact upon which the determination of the scope of constitutionally protected speech turns. As indicated by Justice Harlan in *Curtis Publishing Co. v. Butts, supra,* 388 U.S. at 130, 154-155, the public interest in a plaintiff's activities itself affords the plaintiff access to sufficient counter-argument. If the public has sufficient legitimate public interest in the activity involved, access to adequate means of counter-argument is presumed to exist. Under the Petitioner's reasoning a conscientious publisher intending to write articles such as the article involved in the instant case would have to consider with respect to each of the eighty-six candidates who allegedly failed to file required reports whether such candidate had constitutionally sufficient access to means of counter-argument.

Without regard to its merit, the Petitioner's argument is inappropriate for the reason that the proposition of law which she propounds is not presented under the facts of this case. The plaintiff did in fact have unmistakable access to means of counter-argument which she voluntarily declined to utilize. The A. S. Abell Company, by its managing editor and by its attorney, offered to publish a correction in the Evening Sun (E. 151-152, 154). However, in reply Mrs. Barnes indicated, through her attorney, that she did not request or desire publication of a correction (E. 155).

Moreover, although Mrs. Barnes asserts that she was too inconsequential a candidate to have access to adequate means of counter-argument, she introduced no evidence to that effect.[5] Rather than marshalling facts in her support, her Petition consists largely of an attack upon the language of the opinion of the Maryland Court of Appeals, alleging an improper failure on the part of the Court of Appeals to consider the entire record in the case. However, there is evidence in the record that prior to the election she issued a press release to The A. S. Abell Company setting forth her qualifications and the reasons for her candidacy (Petition for Writ of Certiorari p. 5), and, as the Court of Appeals observed (Petition for Writ of Certiorari p. 15(a)), she testified on cross examination that she recognized the Constitutional Convention to be a matter of considerable public importance, that she considered the matter of who should serve at the Convention to be a matter of great public concern, and for that reason she finally determined to submit herself as a candidate. Furthermore, she published a brochure indicating that her election as a delegate to the Constitutional Convention might directly affect the preservation of "freedoms guar-

[5] The testimony of Mr. Heisler to the effect that before the publication he had not heard of Mrs. Barnes (Petition for Writ of Certiorari, pp. 12, 18) proves nothing but his own lack of knowledge.

anteed by our present State Constitution" and the "basic system of checks and balances so necessary for maintenance of our people's freedom" (Petition for Writ of Certiorari p. 16(a)). If evidence of the public importance of her candidacy for the office of delegate to the Constitutional Convention were necessary, certainly the foregoing testimony emanating from the Petitioner herself should suffice.

It is improbable that a candidate for a public office of such significance to the citizens of the State of Maryland could prove that because of the inadequacy of his campaign he never rose to the stature of a figure of public consequence. However, in the present case there is no evidence that Mrs. Barnes' candidacy was in any respect inadequate or inconsequential. She was simply one of many candidates, and no doubt one of many candidates of considerable public stature, who was not elected.

Mrs. Barnes suggests in her petition that the fact that the publication declared on occurred after the election is relevant to whether she was a public figure (Petition for Writ of Certiorari, pp. 20-21). However, this Honorable Court has dispelled any doubt which might have existed as to whether the constitutional protection which extends to discussion of public figures continues for a reasonable time after the termination of the plaintiff's public office or other public capacity.

> "It is not seriously contended, and could not be, that the fact respondent no longer supervised the Area when the column appeared has decisional significance here. To be sure, there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the *New York Times* rule. But here the management of the Area was still a matter of lively public interest; propositions for further change

were abroad, and public interest in the way in which the prior administration had done its task continued strong. The comment, if it referred to respondent, referred to his performance of duty as a county employee." *Rosenblatt v. Baer, supra,* 383 U.S. at 87; *accord, Hackworth v. Larson,* 165 N.W. 2d 705, 710 (S.D., 1969); *Time, Inc. v. McLaney,* 406 F. 2d 565 (C.A. 5, 1969); *cert. den.* 395 U.S. 922 (1969); *Thompson v. Evening Star Newspaper Co., supra.*

Contrary to the petitioner's assertion, there is no division in the judicial decisions of this country on the question presented in the Petition for Writ of Certiorari. The decisions set forth in the Petition for Writ of Certiorari pp. 21-22 as indicating the existence of such a division simply have no bearing whatsoever upon the proposition of law for which they are cited. For example, in *Thompson v. Evening Star Newspaper Co., supra,* the Court of Appeals affirmed summary judgment for the defendant in a case involving critical newspaper articles (a) published after an election (as well as articles published before the election), (b) concerning an individual (the plaintiff) who was not even the candidate but merely actively supported a slate of candidates. The articles concerned a primary election for the offices of delegate to the Democratic National Convention and membership on the Democratic National Committee in which all members of the slate of candidates were defeated.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANCIS D. MURNAGHAN, JR.,

GEORGE COCHRAN DOUB, JR.,

Attorneys for Respondent.